

Journal of Air Law and Commerce

Volume 2 | Issue 1

Article 7

1931

International Judicial Committee of Aviation

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

International Judicial Committee of Aviation, 2 J. AIR L. & COM. 48 (1931)
<https://scholar.smu.edu/jalc/vol2/iss1/7>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DOCUMENTS

INTERNATIONAL JURIDICAL COMMITTEE OF AVIATION*

The Ninth Congress of the International Juridical Committee of Aviation held in Budapest on September 29 to October 3 was attended by representatives of twenty-two countries. The following resolutions concerning "seadromes" and crimes committed on board aircraft in international flight were adopted:

Navigation Above the High Seas: Airports

(1) Any airport on the high seas for purposes of air traffic, whether the property of an individual or of a state, may be established on the high seas only under the authority and responsibility of a state, whether or not the state has a sea coast.

(2) The state under whose authority such an airport is established on the high seas shall regulate the conditions of admission and use of the airport. If such airport is open to the public, there shall be no discrimination between aircraft based on nationality.

(3) States shall make known to each other their respective plans for establishing airports on the high seas.

If, within a reasonable time, a state shall oppose any plan, the complaint shall be referred to the League of Nations for decision.

If, for any reason the League of Nations cannot properly consider the matter, or if it is unable to settle the difficulty, the parties shall resort to compulsory arbitration.

Criminal Jurisdiction of Air Law

(1) Criminal acts committed on board aircraft shall come under special jurisdiction; the criminal jurisdiction of air law.

(2) The criminal jurisdiction of air law belongs on the one hand to the state of the flag of the aircraft, and on the other hand to the state flown over by the aircraft.

(3) The scope of criminal jurisdiction of air law is the same as that of territorial jurisdiction.

(4) The criminal jurisdiction of air law does not exclude repression on other bases than those of territoriality.

(5) When the aircraft does not have the nationality of the subjacent state, the one of the two competent states having the custody of the prisoner has priority of jurisdiction.

(6) When other states are concerned, competence is governed by priority of special jurisdiction of air law, and the special jurisdiction of criminal air law is governed by priority of the law of the flag, unless:

- (1) the act is such as to endanger the safety and public order of the subjacent state,
- (2) the act injures the inhabitants of the subjacent state.

*Translation furnished by Margaret Lambie, who acknowledges information received from the Aeronautics Trade Division, Department of Commerce, Washington, D. C.

(7) A state which does not permit extradition of its nationals shall punish them when they return to its territory after having incurred liability on board a foreign aircraft for a breach of criminal law.

This provision applies only when extradition of an alien cannot be granted.

INTERNATIONAL LAW ASSOCIATION: REPORT OF THE AERIAL LAW COMMITTEE*

The International Law Association held its Thirty-sixth Conference in New York, September 1 to 10, under the auspices of the American Branch of the Association. The Conference was attended by a representative number of lawyers from many nations, and was presided over by John W. Davis, President of the American Branch. Dr. Walter Simons, former Minister of Foreign Affairs, Germany, was in charge of the session which discussed the report of the Aerial Law Committee.

The main work of this Committee, of which H. F. Manisty is chairman and William Latey is Convener, has been the drafting of codes of civil and criminal law in respect to aerial navigation supplementing the Convention for the Regulation of Air Navigation of 1919. These codes were approved by the Stockholm Conference of the International Law Association in 1924, and were brought to the attention of the International Commission for Air Navigation (see Report of the Committee, Vienna Conference Report, 1926, p. 469). No international convention has been passed accepting these or any other codes. Following a resolution of the Stockholm Conference for the deletion of Article 5 of the 1919 Convention (*viz.*, restricting the flight over the territory of contracting states by aircraft belonging to non-contracting states) a protocol was adopted whereby the article was amended so as to minimize this restriction.

The report discussed briefly the Pan-American Convention for Commercial Aviation signed at Havana, February 15, 1928, and the diplomatic conference held at Warsaw in October, 1929, as well as the Conference of the International Commission for Air Navigation held in Paris, June, 1929.

The Aerial Law Committee of the International Law Association confines itself to suggesting legal principles for general application where they are not now generally recognized, and to reducing as far as possible the conflict of national laws. The Committee had considered the comprehensive proposals of Dr. Herman Döring for an international air navigation convention.

The recommendations of the Aerial Law Committee were slightly modified at the Conference in New York and were adopted as follows:

- (1) It is desirable that all countries of the world should agree to an Air Navigation Convention for the control and conduct of air traffic, and that all States should co-operate in bringing about such a comprehensive international agreement.
- (2) Each contracting party, when not a belligerent, should undertake to accord in times of peace freedom of innocent passage above its territory to private aircraft of the other contracting parties provided that the conditions laid down by the Convention are complied with.
- (3) Air craft operated by concerns authorized to run regular lines of transport should carry the special uniform marks provided for them in addition to the prescribed nationality and registration marks.

*Reported by Margaret Lambie.

- (4) An international regulation should be framed regarding the seizure, attachment or detention of aircraft and the prevention thereof by suitable guarantees.
- (5) Any person who wilfully or negligently disturbs the safety of operation of air navigation by damaging, destroying or removing plant, means of conveyance or other objects which serve the purposes of aerial traffic, by the preparation of obstructions during the flight, by false marks or signals or in any such way and thereby occasions a danger to life and limb or the property of others should be punished. The contracting parties should agree to undertake to promote appropriate legislation in so far as it does not already exist.

The Committee, however, considers that in a juridical sense the Air Convention of 1919 must be regarded as holding the field, though they are anxious to see it supplemented by the code of aerial law already adopted by the International Law Association, and by embodying therein the principles recommended above.

FOREIGN CASES ON AERONAUTICS*

(1) *Fremont v. Soci   Sabena*¹

1. Unfavorable atmospheric conditions do not constitute a case of "accident" or *force majeure*, when they may ordinarily be foreseen and when they do not exceed the normal risks of the air.

2. The clause, referring to the general conditions of transportation of merchandise in Europe, established by the International Air Traffic Association, by the terms of which the transporter "has the right to reship the merchandise by another carrier" does not constitute a mere right of choice. Its obligation in such case is alternative. When it finds it impossible to effectuate the transport by air, the transporter ought to entrust the merchandise to another carrier. In any event, in the case of perishables, it ought at once to ask the shipper for instructions upon discovering that the transportation is impossible.

JUDGMENT

THE COURT: Whereas, by oral agreement of December 22, 1928, the Sabena Company agreed to transport, by plane, from Brussels to London, a case containing natural flowers, which had been entrusted to it by the plaintiff;

Whereas, December 24, 1928, the defendant notified the plaintiff that the flowers had not been transported and that they were shipping back the package;

Whereas, in the interval, and as the defendant might have foreseen, the flowers in question faded and lost all value;

Whereas the plaintiff demands damages today in the total sum of 1,140 fr., on the following account:

Value declared on the package.....	500	fr.
Charges paid	80.50	fr.
Loss of profits	500	fr.
Divers cost sustained	59.50	fr.

And whereas the defendant alleges that it was excused from the performance of the obligation with which it was charged by reason of the

*The following four cases were translated by William C. Wines.

(1) Tribunal de Commerce de Bruxelles (14^e Chambre) January 14, 1929. Reported in *Droit A rien* (Apr.-May-June, 1930) p. 353.

occurrence of a fortuitous event and *force majeure* consisting in the atmospheric conditions which precluded aerial navigation the 22nd, 23rd and 24th of December 1928.

And whereas (as it further alleges) according to the terms of the verbal agreement between the parties (and which referred to the general conditions of transportation by air in Europe, established by the International Air Traffic Association) it, for one reason or another, it could not ship or transport the merchandise, by way of the air, it had the right to ship the merchandise by another carrier, but without being obliged to effectuate the transportation by a third party;

And whereas, according to its intendment, the clause invoked was merely optional, it could not be held liable for having retained the merchandise, since the circumstances did not permit it to transport the merchandise by plane into England;

And whereas it is contested that one can see in the atmospheric conditions a case of *force majeure*;

And whereas the international juridical committee of aviation, in its session of October 27, 1927, decided that the atmospheric conditions in the transportation of persons or goods would not be considered as a case of *force majeure*, relieving the carrier of its liability (*Revue juridique internationale de la locomotion aérienne*, 1928, page 81);

Whereas it has been contended, in support of this argument, that, in transportation by air, the risks derived from atmospheric conditions constitute the normal risks of the route, and cannot be considered as unforeseeable; that the duty is upon the carrier to foresee them, and if he cannot do so, to assume the consequences (Ripert, *La force majeure dans les transports aériens*; *Revue juridique internationale de la locomotion aérienne*, 1928, page 6);

Whereas the notion of fortuitous case or of *force majeure* implies the union of two conditions:

(a) That the event constituting a fortuitous circumstance or *force majeure* escapes all foresight;

(b) That it constitutes an insurmountable obstacle to the performance of the obligation by the obligor (Colin and Capitant, *Droit civil*, 1920, Vol. II, p. 11);

That, from the moment when the event can be "normally" foreseen by the obligor, the event ceases to be a fortuitous circumstance, or a *force majeure* and does not relieve him of his obligation (cassation fr. req. 15 juin 1911, *Dalloz périodique*, 1912, I, 181):

That unfavorable atmospheric conditions enter into normal contemplation, of which the carrier can and ought to take account in aerial navigation;

Whereas, nevertheless, it may be considered that in the actual state of the aviation, that it could not have been within the actual contemplation of the shipper and the carrier, that the transport of the merchandise entrusted to the latter should be accomplished without regard to the conditions of the weather;

That it is in conformity with the implied intention of the parties to admit that in the case where the transportation presents abnormal dangers, regard being had to the fragile nature of aircraft, the carrier is not bound to

undertake a particularly dangerous voyage (Tissot, *de la responsabilité en matière de navigation aérienne*, Paris, 1925 page 68) ;

Whereas it appears from a verbal declaration of the director of the Royal Meteorological Institute of Belgium, of January 8, 1928, that the meteorological observations are summed up as follows: December 22, the morning foggy, good weather on the East of England; in the afternoon rain and low clouds, on the East of England and the North Sea; December 23, low clouds and rain up to the beginning of the afternoon, to and including the regions around Brussels; December 24, morning bad, low visibility and clouds at Brussels, fair weather on the North Sea;

Whereas it cannot be inferred from these observations that the voyage from Brussels to London presented particularly grave dangers during the days of the 22nd, 23rd and 24th of December;

That in truth the poor visibility created by the occurrence of rain and clouds prevented the aviators from steering by landmarks, but that they could obviate this inconvenience by ascertaining directions from a compass, taking account of corrections rendered necessary by the proximity of the motor;

That besides, the verbal declaration cited from the director of the meteorological institute observes that, during the days of the 22nd, 23rd and 24th of December, 1928, the wind was not strong enough to prevent aerial transportation.

Whereas, moreover, if it were even necessary to consider the atmospheric conditions indicated as sufficiently dangerous that, by the implied will of the parties, the Sabena Company was relieved from the duty of undertaking the voyage, it is nevertheless at fault for not having reshipped the flowers entrusted to it by another transport company;

That the clause by virtue of which the Sabena Co., if it cannot transport the merchandise by air "has the right to reship the merchandise by another transport company" cannot be considered as merely reserving to the company the option of so doing;

That the obligation of the Sabena Company is alternative in that it will either transport the package by air, or, if it can not transport the package by that means, it should entrust it to another organization;

That one cannot see what interest the Sabena society, relieved by the circumstances from completing the transport by air, would have in reserving "the right" to use another mode of transport; that the Sabena society, in stipulating the clause in litigation, only wanted to indicate its attitude "in case the transport by air should be impossible or too dangerous."

Whereas if the Sabena Society, on December 22, considering the bad weather conditions which it relies upon today, had reshipped the flowers by the Ostend-Dover line, the flowers so shipped would not have lost all value;

That in any case, when goods of an essentially perishable nature are involved, the Sabena Society should, when obstacles prevented the immediate transportation of the goods, have solicited immediate instructions from the shipper and should not have waited until the time, in which the shipment might have been made by sea or air, had expired; Whereas the plaintiff claims, with good reason, the reimbursement for the value of the package, such as was verbally declared by him on December 22, 1928, and the

restitution of charges paid; this amounts to a total of 580 fr. and 50 centimes; and he has not proven the other damages;

For these reasons: the Court, rejecting other conclusions in support of or contrary to this opinion, requires the defendant to pay to the plaintiff 580 fr. and 50 centimes as damages; and requires it to pay legal interest and costs.

(2) Compagnie aérienne française et Chambre syndicate des industries aeronautiques*

1. The freedom of aerial navigation above French territory and the interdiction which can be brought about by forbidding flight above certain zones for military reasons or the public security, result, respectively, from art. 19 and 20 of the law of May 31, 1924; it also arises from the cumulation of legislative and regulatory dispositions relative to the policing of aerial navigation that the above mentioned interdiction is within the jurisdiction, not of the prefect, but of the minister.

2. All aircraft in contact with the water being assimilated, by Art. 5 of the decree of May 19, 1928, to a boat of interior navigation and constrained to the rules which control such boats, it appertains to the prefect, in conformity with the provisions of the 1st article of the decree of March 24, 1914, to regulate, subject to the approbation of the Minister of Public Works, the departures and the sea-landings of hydroplanes on the course of navigable water—these powers may not be used except in the interests of policing the said water-courses.

Therefore, the order of the prefect which, without being founded upon such motive, forbids in a general and absolute manner departures from or landings upon certain regions, should be annulled as being an excessive exercise of power.

DECREE

THE COUNCIL, Considering: 1st, The petition and supporting memorandum presented for the Compagnie aérienne française, 2nd, the petition and the supporting memorandum for the Chambre syndicate des industries aeronautiques, praying that it may please the Council to annul a decree dated August 8, 1928, by which the prefect of Seine-et-Oise has forbidden departures, flights or landings of aircraft in the region of Pecq, of Montesson and of Mesnil-le-Roi;

Considering that the two petitions aforesaid present the same question for judgment; that there is reason for joining them and adjudging them by the same decision;

Considering that, by decree of August 8, 1928, the Prefect of Seine-et-Oise has forbidden flights, as well as departures or landings of airplanes;

Considering that, according to Art. 19 of the law of May 31, 1924, aircraft may fly freely over French territory and that Art. 10 of the same law provides that flights over certain zones may be forbidden for military reasons or public security; that it results from the cumulation of legislative and regulatory dispositions relative to the special policing of aerial navigation that it appertains, not to the prefect, but to the Minister, to take the said measures; that, consequently, the petitioners contend that the decree of the

*Conseil d'État (au contentieux). France, March 7, 1930. Reported in *Droit Aérien* (Apr.-May-June, 1930) p. 357.

Prefect of Seine-et-Oise is incompetent, insofar as it forbids flight over a certain zone of the territory.

Considering, furthermore, that according to the terms of Art. 5 of the decree of May, 1928, "Every airplane in contact with the water is regarded assimilated to a boat of interior navigation and is constrained to the rules which regulate such boats"; that hence, by reason of this similarity, it appertains to the prefect, in conformity with the 1st article of the decree of March 24, 1914, to regulate, subject to the approval of the Minister of Public Works, the departure and landings of airplanes on navigable water-courses, he may only use his powers so recognized in the interests of the policing of said waters;

Considering that it is clear that no such motive can be invoked by the Prefect of Seine-et-Oise to legitimate "the general and absolute interdiction of departures or landings in the said region covered by this decree", the petitioners have a basis for their contention that the above cited provisions of the judgment constitute an excessive use of power.

Held, The above considered order of the Prefect of Seine-et-Oise, dated August 8, 1928, is annulled.
Gentlemen,¹

The Compagnie Aérienne Française organized in September, 1927, next to Saint-Germain, exactly at Pecq, a hydroplane station. It directed trips to Cherbourg and Calais, it transported material and shipments to provincial stations or in foreign countries.

It was thus led to use the course of the Seine from the viaduct at Pecq to the bridge of Sartrouville, a straight line of four kilometers, assuring the exploitation of the maximum security.

It had then requested from the Bridge and Grounds Service a special authorization for flights and landings near Pecq. The Service replied that it had not the power to accord the authorization, that the Company must conform to the prescriptions of a decree of the Under-Secretary of State of Aeronautics of March 22, 1922, which the company did.

The aerial traffic appeared to be rather light, for according to the inquiry, there were only seven hours of flight in June, 1928, twenty hours in July. Nevertheless, the mayors of the communes of Pecq, of Mesnil-le-Roi, on the left bank of the Seine and of Montesson, a rather distant village on the right bank, advised the Prefect of Seine-et-Oise of the inconvenience caused by the noise of motors and the danger that the flights of hydroplanes presented to the people. And on Aug. 8, 1928, the Prefect of Seine-et-Oise pronounced the following decree:

"It is forbidden to depart from, fly over or land with aircraft in the region of Pecq, Montesson or Mesnil-le-Roi".

Two petitions were addressed to him, the first coming from the Compagnie Aérienne Française, directly. The second is formed by the Chambre Syndicate des industries aéronautiques and also receivable, since Art. 3 of the statutes recognize as an obligation the study and defense of economic, commercial and aeronautic interests, as well as the defense of the economic interests of the members of the Council.

1. The following statement, as reported in *Droit Aérien*, p. 358 pp., was read by Governmental Commissioner Dayras.

The petitioners submit that only the Minister was competent to make a decree of this nature. This question being new, we should first consider how aerial navigation was regulated.

We must distinguish, in this respect, the two parts of the decree of the prefect: the prohibition of flights in the region indicated in the three communes, and the interdiction of all departure or landing.

On the first point, Art. 2 of the decree of July 8, 1920, is very clear:

"It is forbidden to fly over certain zones of the French territory . . . The list of the zones above which flight is forbidden will be made the subject of a special decree."

Therefore, only the President of the Republic is competent to act.

But this decree is, at the present time, abrogated by the law of May 31, 1924. Article 19 of this law contains a fundamental rule:

Aircraft may circulate freely over French territory under certain restrictions which are imposed by the state on airplanes of foreign nationality.

Furthermore, we are not here concerned with the rights of the property of inhabitants over which the flights occurred which is outside the present discussion.

Since, according to the terms of Article 20, of which you are to give the interpretation today, flight over certain zones of French territory may be prohibited by decree, for military reasons or the security of the public.

The preparatory works afford us no information which will enable us to define the word "arrêté" by itself, without qualification: ministerial, prefectorial or municipal.

The project of the law announced by the government has been completely modified after discussion pursued in the Society of Legislative Studies, which has been clothed with a certain official character for the Under-Secretary of State of Aeronautics himself presided; but neither before this society, nor before the parliament, has any indication been furnished as to the meaning of Article 20, which has apparently been proposed by military authority.

Normally, the powers in police matters pertain to the mayors with a commune, to prefects with several communes or a department, or to the President of the Republic if the measure exceeds the scope of a department.

The minister, much more exceptionally, may confer powers. However, it is easy to find exceptions in the case of railroads, mines, security in the distribution of electrical energy.

We think that you are to decide here that, in matters of aerial navigation, only the minister can appreciate the very complex general interests which are involved.

In the first place, aerial navigation is distinguished profoundly from land transportation. According to the terms of Article 1 of the International Convention of Paris, of October 13, 1919, which was ratified by the French chambers and promulgated by the decree of July 8, 1922, it is the State which has exclusive and complete sovereignty over the atmospheric space above its territory. The condition of the domain of the air is, then, that of a public national domain. In law, it cannot be partitioned into administrative districts in which mayors, prefects and the President of the Republic superimpose three regulatory powers.

In fact, moreover, the airplane with its range of action and the itineraries from city to city, from nation to nation and from continent to

continent, cannot be required to transform a straight flight into a sinuous line which local regulations would impose upon it, and the international character of aviation is carried into Article 3 of the same convention of 1919:

Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting states from flying over certain areas of its territory in that case, the locality of the prohibited zone shall be published and notified beforehand to the other contracting States.

The text of the law of 1924 exactly looks to the same reasons for interdiction. Now, logically, it is impossible to conceive of a zone permitted to foreign aviators and forbidden to French aviators because the general interests would have been perceived by different authorities. Unification could only be accomplished by higher authority, and the conflict demanded the intervention of the minister.

In fact, two decrees have already intervened the 20th of April, 1926, forbidding flight above certain zones of French territory. Far from being signed by a prefect, they were signed by six ministers, for it was a question of preserving our frontiers on the East but the competent authority cannot vary according to the motive invoked to justify the interdiction.

Do these reasons of general order find support or detraction in the interpretation adopted upon other points by the regulation of aerial navigation? Gentlemen, in running through the articles of the law of 1924 and of the decree of 1928, we see that it is the minister who authorizes the establishment of departmental and communal airdromes, it is he who designates the place reserved for departure and flying of aircraft over navigable ways.

If the flight of aircraft constituting a popular spectacle are authorized by the prefect from the time the exhibition transcends the confines of one department, the minister of the interior is to intervene.

Hence, the Prefect of Seine-et-Oise was, in our opinion, incompetent to forbid all aviators to fly over a certain part of the department.

But he has also forbidden departures and landings of hydroplanes, and here a special regulation intervenes, an edict by Articles 6 and 9 of the decree of May 19, 1928:

On navigable waters or their tributaries, landing places may be reserved to aircraft by the Minister of Public Works, and forbidden to boats; or even testing stations for the receiving of such apparatus and the temporary calling or service may be permitted by the prefect under the authority of the Minister of Public Works.

On the Seine, between Pecq and Sartrouville, there is neither a place reserved nor a starting station. The petitioning company therefore finds itself subject to the rule of common law which is mentioned in Article 7 of the same decree which is as follows:

On other parts of navigable waters, aircraft may take flight or land on condition that they observe certain precautions which relate particularly to the distance which is to separate them from obstacles, etc.

Thus, the Company had no need of any authorization, on condition that it respect the prescription announced in Article 7, and it is not contested that it did so.

But a regulation was nevertheless possible. In fact, according to Article 5 of this decree, any airplane in contact with the water is similar to a boat of interior navigation, and is subject to the regulations which regulate such boat. Now, a decree of 1914 carries a general regulation for flights of interior navigation and provides, in its first article, that prefectural orders carrying particular regulation for its application may be made.

The prefect of Seine-et-Oise was therefore quite competent to regulate the departure and landing of an airplane, since the hydroplane is used in contact with the water.

We must note however that the orders are not in force until they have been approved by the Minister of Public Works, which comes back, definitely, to a general ministerial concurrence.

Here, we indicate that this approval has not intervened. The order is not, then, in force on this point. Must we conclude, then, that it does no harm to the Society, and that consequently it cannot be the object of a proceeding for excessive use of power?

Gentlemen, this prefectural order groups together distinct provisions, as we have indicated. The prefect certainly intended to act by virtue of his generally established powers. He has forgotten Article 5 of the decree of 1928. He has not demanded ministerial authorization which was necessary; but has so far conceived his order to be in force that he has caused law suits to be commenced against the Compagnie aérienne, and that the Court of Versailles has decided to suspend its judgment until you have passed upon the order.

Your jurisprudence has moreover the clear tendency to extend the notion of the act which does harm and which it appears to us is capable of being frequently repeated, for in general, an act not approved would not be recognized by third parties, and we think it interesting thus to complete the theory, in recognizing this competence in the prefects. But how will the powers go? Article 20 of the decree of March 24, 1914, permits the designation of parts of navigable ways with restrictions as to certain modes of navigation.

The absolute interdiction in the matter of aircraft should, in our opinion, be exceptional; if not, the regulations of ministers will become entirely illusory by the prohibition of flights and landings. Moreover, the regulatory power of the prefect ought to be reconciled with the general principle of the liberty of aerial navigation, which is proclaimed by the law of 1924.

The prefect can only act in the interests of policing the coasts. Here, the order applied is based on two motives: evident annoyance to riparian inhabitants, which is insufficient; and danger to very intense river traffic, which occurs on the Seine. But all the authorities consulted, engineers, general counsel of bridges and highways and the Minister of Public Works, are unanimous in affirming that, from this point of view, the prefect has not soundly appreciated the facts, and that there exists no justification for the pronouncement.

This decisive reason therefore leads us to the total annulment of the order attacked, and it is thus that we conclude.

(3) *Compagnie générale aéropostale (Latécoère) v. Corcoll**

*Cour de Cassation (Ch. des Requêtes). Reported in *Droit Aérien* (Apr.-May-June, 1930) p. 364. This decree affirmed that rendered in the same

One who has been injured and burned in cooperation in saving the pilot and load of mail of an airplane burned in flying is authorized, under the terms of articles 53 and 56 of the law of May 31, 1924, to bring his action for damages before the court in the place where the accident occurred.

These articles provide, in effect, that the action for damages caused to persons or property situated on the ground may be brought, at the election of the plaintiff, before the court in the place where the damage occurred, or before the court of the domicile of the defendant.

DECREE

THE COURT: On the only means taken for the violation and false application of Articles 59 . pr. civ., 53 and 56 of the law of May 31, 1924, and 7 of the law of April 20, 1810, for default of reason and want of legal basis:

Whereas Corcoll was injured and seriously burned while he cooperated in the rescue of the personnel and mail sacks of an airplane set on fire by the fact of its flight, we consider the judgment attacked for having declared competent the court of Perpignan in the territory in which the accident occurred, when the legal situs of the Société aéropostale Latécoère, defendant, is in Paris;

But whereas according to the terms of Arts. 53 and 56 of the law of May 31, 1924, on aerial navigation, the action for damages caused by flights of airplanes to persons or things may be brought, at the election of the plaintiff, before the court of the place where the damage occurred or before the court of the defendant's domicile; that it follows that the Court of Appeals, in holding as it did, instead of violating the above cited texts, exactly applied them.

For these reasons, rejected.

(4) Ministère public v. Schmeltz and Ramey

1. A student military pilot, under military discipline, who has only obeyed orders received, cannot be held criminally responsible for an accident of which he is the cause, if he has committed no private fault.

On the other hand, the Director of a School of Military Aviation can ultimately be held in fault if he has not taken the necessary precautions to assure the protection of the public, when the land where the aircraft are directed to move is not exclusively reserved for aviation. Furthermore it is necessary that this negligence be the cause of the accident and that it must not be the fault of the victim.

2. An aircraft running on the ground outside of an airdrome regularly established commits no infraction of the law of May 31, 1924, relative to aerial navigation, of which Art. 24 only considers the landing and departure.

It is not required to observe the rules of the Code of the Way with respect to sounding signals, breadth of vehicles or freedom of driver's vision, since aircraft constitute vehicles of a special class, for which these provisions seem to have not been made, and they are otherwise under special regulation.

case by the cour d'Appel de Montpellier, June 26, 1929. See *Droit Aérien* (Jan.-Feb.-March, 1930) p. 187; 1 *JOUR. AIR LAW* 378.

*Tribunal Correctionnel d'Abbeville, July 4, 1929. Reported in *Droit Aérien* (Apr.-May-June, 1930) p. 365.

JUDGMENT

THE COURT: Whereas, Ramey, student military pilot and Schmeltz, director of the Military Aviation School of Crotoy, are both sued at the instance of the Procureur of the Republic on the following charges:

First: Schmeltz and Ramey having at Crotoy August 29, 1928, by want of skill, imprudence, negligence, inattention or want of observation of rules, involuntarily having caused a homicide on the person of Dr. Coyon.

Second: Ramey alone having landed or taken off with his aircraft outside a regularly established airdrome.

Third: Schmeltz of having made himself an accomplice by instructions given as to the wrong so committed by Ramey.

Fourth: Both, moreover, of having violated the provisions of articles 25, 3 and 22 of the decree of Dec. 31, 1922, by not having a warning apparatus on the vehicle driven by Ramey, not having a free front view for the one in charge of the vehicle, and having a breadth greater than two and one-half metres.

Whereas by written conclusions taken during the course of the dispute by Maître Saur, taken at Abbeville, and presented at the bar by Maître Jamain, lawyer of the Cour d'Appel of Paris, Mme. Coyon, widow, demands a judgment of joint liability against Ramey and Schmeltz to the amount of 600,000 francs damages to obtain redress for the injury occasioned to her by the death of her husband imputed to the fault of the two accused in the terms of Article 319 of the Penal Code.

Whereas Rene Caudron is cited as civilly liable.

Whereas—on the penal liability of Ramey and of Schmeltz—the Caudron School of Military Aviation was placed at Crotoy under the control of the Minister of War for the training of student pilots; that these were under military authority during their stay at school and were submitted to discipline, so that Ramey had neither choice of his apparatus, nor the course of his plane on the ground, that in following, with the group of which he was a part, under the direction of a chief monitor Aug. 29, 1928, the path where the accident occurred, he only obeyed orders given him, and whereas it is always proper to inquire whether he has committed a private fault, capable of having caused the personal injury on the occasion of the accident which caused the death of Doctor Coyon.

Now, whereas it has been in no wise established that this regrettable accident was due, either to the excessive speed, undertaken by Ramey on his own initiative, in the plane which he piloted, or to the irregularity of its running, or to want of attention to the leader, or to any lack of precaution, whereas we should not know how to impute reasonably to Ramey his not having sufficiently surveyed the route or taken indispensable provisions to avoid carriages or phaetons going about on the bank, in fact, the elements gathered by information and arguments, that the pilot, because of his seat in the plane cannot see before him, when he is running on the ground, without being obliged to get up, and that he cannot, without danger to himself, repeat this manœuvre too frequently and at any moment without losing by the same act control of the machine, that Ramey had seen before him, at the same time a fisherman's carriage, which was along the left toward the sea, and the group of people walking in which was Dr. Coyon, which group was along the right, toward the dune, and was so situated as to believe that his

approach had been noticed, and that no obstacle was before him, that he could then in confidence continue his route in correctly following the path without having to take special precaution to avoid Dr. Coyon, that the latter had, moreover, not only been warned in advance of the arrival of the plane, and of the danger which he might run in not getting out of the way, but that he voluntarily remained in the path and pretended that there was no danger and that the pilot would see him, and whereas it is in these circumstances and by this act that he was mortally struck by the wing of the plane of Ramey.

Whereas it results from this analysis of the facts and circumstances that the accident was not caused directly either by the speed of the plane, or by its failure to signal, or its build, or by any fault attributable to Ramey, but was caused solely by the self-same imprudence of the victim.

Whereas—relative to that which concerns Schmeltz—the School of Military Aviation of Crotoy was installed and inaugurated officially by the government in February, 1923, and whereas the Minister of War has controlled it and since then has never criticized its installation, either from the point of view of the safety of the pilots, or from the standpoint of the users of the grounds, that in truth the natural path followed by planes to come upon the flying field was not exclusively reserved for aviation, that it was only a part of the public maritime domain, accessible at any moment during low tides and that the duty was upon the school to take serious and special precaution for the protection of bathers and users of the shore, that in this regard Schmeltz would have done well to mark the way used by the planes or in protecting it, or in publicly warning the public of the dangers to which it was exposed during the hours at which the airplanes came out, or in taking some other opportune measure. But whereas if one can consider his lack of care a fault, we cannot declare that it was the cause of the accident to Dr. Coyon, and whereas in fact that old habitue of the shore of Crotoy, informed of what usually occurred and of the dangers presented by the frequent evolutions of planes with which he was familiar, was not surprised by the presence of Ramey's plane, as a stranger to the locality might have been, that in fact he had seen him arrive, that the presence had been signaled by Mme. Carlier, who accompanied him and that he had not only refused to get over to the side but had imprudently counseled the said woman to imitate him, and that it is by his own fault and not by that of Ramey that he was mortally injured.

Whereas, concerning the wrong charged in an infraction of the law of May 31, 1924, concerning aerial navigation afore-mentioned, it is clear even from an examination of the facts that Ramey cannot be regarded as having taken off or landed on the bank where the accident occurred, that he was simply running along to get to the flying field, in view of a possible flight, and that we should not consider a plane as taking off until the moment when it accelerates its motion to attain the speed necessary for its flight, that the manoeuvre executed by Ramey Aug. 29, 1928, was only in the process on which he was a party, so that the infraction strictly provided for by the law cannot be relied upon in the case.

Whereas it logically follows from what has preceded that Schmeltz could not have rendered himself an accomplice in a wrong which does not exist.

Whereas Ramey and Schmeltz must, in consequence, be relieved of the duty of prevention.

Whereas—relative to violations of the *code de la route*—in applying the decree of December 31, 1922, account should be taken of the special nature and purpose of airplanes and aircraft which constitute them a vehicle of a special class for which the provisions raised by the prevention do not appear to have been taken, that the *code de la route*, in spite of the generality of its terms, has regulated the traffic and running of land vehicles, that airplanes and aircraft are submitted to a special regulation, that the legislature has in no wise compelled air planes to be equipped with a sounding apparatus, nor limited their carriage gage, or compelled them to be so constructed as to assure any particular vision on the ground to the pilots, that even Article 5 of the decree of Dec. 31, 1922, which limits the transverse breadth of vehicles to two and a half metres, contains a formal exception for "special materials of the department of war and the navy where these prescriptions are incompatible with their purpose," that there can be no doubt that an airplane remains, in all circumstances, what it is by its own nature and purpose and that the provisions of the *code de la route* which Ramey and Schmeltz would have violated according to the complaint, are not applicable, and that hence the complaint lacks legal basis.

Whereas—on the civil claim—no penal condemnation can intervene against the defendants by reason of the facts raised by the charge, the court cannot give countenance to the civil claim, that it is in fact a settled principle of the law that the *siege repressif* cannot act on the civil claim when it pronounces the defendant's acquittal, argument of Articles 159, 191 and 212 of the criminal code of instruction.

For these reasons

Deciding on the requisitions of the Public Minister. Acquits Ramey and Schmeltz of the charge and discharges them without punishment or cost. In consequence held that there is no civil liability on Caudron. Announcing conclusions on the civil claim.

Denies Mme. Coyon all her claims, complaints and conclusions and orders her to pay the costs of her suit.

FOREIGN CASES ON RADIO

(1) Recording of a broadcast program on photograph disques as unfair competition¹

STATEMENT OF FACTS

The plaintiff operates the Berlin Broadcasting Station. On October 11, 1927, it picked up electrically and broadcast a boxing match between Wagener and Diener, along with a running descriptive discourse by the sports editor, Koslowski, engaged by the plaintiff for that purpose.

Without the knowledge of the plaintiff, the defendant had, by means of his receiving set, recorded the broadcasting of the last round phonographically and thus produced phonograph disques, which he retailed commercially.

1. Translated by Louis G. Caldwell. Judgment of the *Kammergericht* (Berlin) of June 7, 1928 (10 U.4658/28) Reported in *Archiv für Funkrecht*, Vol. I, p. 665.

By reason thereof the plaintiff claims an interference with the carrying on of its business, a violation of its personal rights, unfair competition, and an unlawful act. It sues to enjoin the reproduction and distribution of the phonograph disques. The defendant pleads that he had a right to do what he had done.

The *Landgericht* gave judgment for the plaintiff.

From this the defendant took an appeal on the ground that the complaint should be dismissed.

Incidentally, each of the parties requested the granting of a stay of the decree according to Sec. 713 Abs. 2 Z P O. The plaintiff asked for security for payment with the request that this be effected through a bank as surety.

Reference is made to the detailed contents of the judgment appealed from as set forth in the record. However, the parties have argued according to their prepared briefs of April 26, and June 21 and 27, 1928. In the argument one of the phonograph disques in dispute was played; the plaintiff, however, declared that it does not base its suit on the author's right (copyright) belonging to it.

GROUND OF DECISION

The basis of the judgment appealed from, even though one agrees with the outcome, appears not free from doubt. The parties do not stand in any contract relation to each other. If one can speak at all of a contract relationship, it is such a relationship of a public-legal nature between the subscriber (*Teilnehmer*) and the Postal Administration, as exists in the case of every ordinary telephone conversation.

A misuse of the receiving installation makes the subscriber responsible in principle first of all only as against the Postal Administration, which in particular can curtail or withdraw the license conferred, according to the uses permitted. The amount of the compensation, which is paid to the Postal Administration for the licensing of the receiving installation, is for that reason without significance for the rights and duties of the subscriber as against the broadcasting company. In particular, it cannot be said that the subscriber is authorized only to listen, and that therefore a commercially profitable use is absolutely excluded. If, for example, an innkeeper sets up a loudspeaker in his public rooms, in order to court the attendance of visitors at his inn, then if the stipulated tax has been paid, there is nothing to be said against it. The carrying on of the business of the broadcasting company is not thereby prejudiced. Thus there is a lack of any general principle justifying a holding that the broadcasting company can, through an *ex parte* declaration, forbid a certain exploitation of broadcast communications, in so far as particular rules—such, for example, as those protecting authors' rights—do not give such a right of forbidding. In the instant case the veto power sought by the plaintiff might perhaps be justified from the viewpoint of authors' rights, since it concerned not only mere factual news reports but, in substantial measure, a lecture which, within the meaning of Ziff. 1 Lug., served to entertain and to instruct and which, to be given suitably for broadcast listeners, requires a special training. This viewpoint, however, is at variance with the express declaration of the plaintiff. There remains the viewpoint of Sec. 1 UWG. and Sec. 826 BGB. The defendant has,

by means of phonographic recording, brought the plaintiff's program permanently into his possession without any intellectual effort on his part and without substantial cost and thus has materially prejudiced plaintiff's interests. The situation is like that of the phonograph disque case heard by the High Court of Justice (*Reichsgericht*) (RGZ 73 S. 294 ff.) In that case it is declared with justice that it is repugnant to the requisites of honest commercial intercourse to appropriate to one's self, without any considerable effort and cost, the fruits of another's labor produced with considerable effort and at great cost, and thus to create dangerous competition for the other. The impropriety of the conduct in question is demonstrated by the following consideration. As the plaintiff emphasized in the oral argument, it has great difficulties to fear on the part of artists and other performers if the latter must take into account that their broadcast performances may be phonographically recorded by anyone and may be exploited commercially in the form of phonograph disques. The performers would then make considerably higher claims on the broadcasting company or, in many cases, would altogether refuse their cooperation. No opinion need be expressed on the question whether the artist, whose broadcast performance is reproduced and exploited, can himself take proceedings against it. In any case such a legal result is for the most part complicated with greater difficulties; the amount of the eventual damages is especially difficult to appraise. Also in the case of sport events of the instant sort the manager might easily act in like fashion. He would ask of the broadcasting company a considerably higher compensation for a broadcasting of the fight and of the accompanying description. A different conclusion is not in any way required by the fact that the event involved herein occurred some time ago. Were the reproduction and distribution of the disques in question permitted, then that would be sufficient to cause the management of similar fights, which enjoy a great popularity with the public, to exhibit a particular reserve as against broadcasting stations. Accordingly it is also immaterial that the plaintiff itself intends to record its programs by means of phonograph disques. Moreover the recording of such programs for the film by the method of the so-called Triergon process is known, to which the plaintiff, as is openly known in the Senate, is now devoting a particular interest.

Accordingly there clearly appears a commercial competition between the parties. There is involved, in the broadest measure, a "conversion of performance." The complaint is consequently legally substantiated. It is unnecessary to go into the other issues, especially the contested question of a general "right of the sender over matter transmitted."

(2) Unauthorized publication by a newspaper of news broadcast by a broadcasting station as unfair competition¹

Defendant, who is the publisher of the "Neues Tageblatt Oebisfelde" a newspaper appearing in Oebisfelde, on November 1, 1928 at 7:30 a. m. distributed without charge and publicly posted an extra which has been admitted in evidence and which announces the landing of the airship "Graf Zeppelin" after its successful trip to America.

1. Translated by Carl Zollmann, Marquette University School of Law. Opinion of the *Reichsgericht* of April 29, 1930. Reported in *Archiv für Funkrecht*, Vol. III, p. 425.

This landing of the airship was at that time at once made known to all licensed radio listeners, to which the defendant belonged, by all the German sending stations in the form of a notice to all (*Nachricht für alle*). This particular notice was received through the Stuttgart sending station. In order to be able to convey the news while the landing was still going on the Stuttgart station had sent a special reporter to Friedrichshafen who was connected with the Stuttgart station by a special wire.

Plaintiff which designates itself as the holding company (*Dachgesellschaft*) of the German sending stations, who are all associated with it, on account of section 2 of its constitution, claims the right to represent these stations in juristic questions as against the press and the press services. According to such section 2 it has "the central control of the associated sending stations particularly the completion of the general administrative work of the sending stations" and furnishes financial support of technical and scientific works for the advancement of radio.

Plaintiff claims that defendant has through the extra passed on the news received by radio and has thus taken an unfair advantage of the plaintiff. It claims that defendant could not in any other manner, e. g. through the telegraph through which newspapers generally get their news, have received this news at the early hour at which the extra was published. It further states that defendant has in prior cases done the same thing.

Plaintiff claims that this constitutes a legal wrong. It therefore demands in its own right and as the representative (*Zessionaerin*) of the radio sending companies, who according to her statement have assigned their rights to it, that defendant cease to publish news received through the radio in his newspaper.

Defendant moved for judgment. It denied that it heard the radio message in regard to the landing of the airship and claimed and adduced evidence that it received this news through the Telegraph Union in Magdeburg which commonly supplies it with news. However defendant contends that the publication of news received through the radio, particularly where it concerns such a news of interest to the whole people, is legally without objection.

Both lower courts—the trial court of Stendal on January 22, 1929 and the intermediate court of Naumburg on June 10, 1929—have decided for the defendant.

Plaintiff appeals from the latter decision while defendant asks that the appeal be dismissed.

REASONS

Both lower courts have not attempted to decide whether the defendant received the news through the radio whose licensee he is or through the Telegraph Union as defendant contends. Both assume that the statements made by the plaintiff are true but that it does not state a cause of action. The court agrees with this conclusion.

The first question to be settled is whether there is a legal relationship between the sending companies and their subscribers (listeners) to which defendant doubtlessly belonged. The question must be denied. No contract exists between them. (*Neugebauer: Fernmelderecht und Rundfunkrecht*, S. 736dd. und *Opet in Gruchot Bd. 68*, S. 473) The juristic relationship between the subscribers and the German Imperial Postoffice which has the

right to bestow the privilege of listening gives radio sending companies no immediate claim growing out of the conditions imposed on the subscribers by the post office in the nature of a contract for the benefit of third persons (section 328ff. BGB.). These conditions cover only rights and obligations between the subscriber and post office. For each subscriber must obtain the authority to listen even though for example he does not desire to hear the production of a German sending company but wishes only to hear some foreign radio. The radio fee which the subscriber must pay to the post office therefor is no consideration for what the sending companies have to offer but only a fee for the right to erect and conduct a receiving set with which to hear the programs of the sending companies, a right which he does not enjoy without a permit, according to the right of communication (Fernmelderecht). It follows that the sending companies have no duties toward the subscribers for the performance of certain advertised programs or any programs whatsoever, and they have against them no right to claim compensation for their programs. Therefore the subscriber has against them no claim for damages because programs have not been rendered.

The complaint therefore cannot be supported on the basis of contract between the parties. That at least is the situation for the present. It is possible in view of the constantly growing importance of radio for the general public and the conceivable creation of juristic relations between the subscribers and the sending companies that legal relations between them may arise by which the license given to the subscriber by the post office will confer a peculiar right for the subscriber in the programs of the sending companies from which for both parties further contractual rights and duties would result (compare Neugebauer, a.a.O., S. 737, 738).

Plaintiff contends that Germany by the statute of May 2, 1929 has ratified the Washington Radio Convention of November 25, 1927 (RGB1, 1929, 2, S. 265) and that according to article 5 the high contracting states have obligated themselves to take measures or to propose measures to their legislative bodies to suppress the unauthorized publication or utilization of news obtained through radio. Plaintiff contends that Germany has fulfilled this requirement by the provisions of section 11 of the *Fernmeldeanlagen-gesetz* (FAG.) of January 14, 1928 (RGB1, 1928, 1, S. 8). It concludes that this prohibits the utilization of news received through a receiving set in Germany. This is erroneous. The provisions of section 10 FAG., to which section 11 refers covers the duty of secrecy in regard to telegraph and telephone. Section 11 a.a.O. imposes on the owners of private (nonofficial) radios a particular duty of secrecy in regard to foreign news. Section 11 however does not protect news items which, even though they are intrusted to the post office are not intended to be protected by secrecy like telegraph and telephone communication, namely, the so-called Cq news items and the material covered by radio programs (Neugebauer a.a.O., S. 238 under B.). Cq. news items are items addressed not to a particular person but to the public in general. These by their very nature are not subject to secrecy (Neugebauer, a.a.O. S. 229 under B). The statement by Neugebauer S. 219, 220 that that German jurisprudence has already adapted itself to the radio treaty of November 25, 1927 held at Washington is to be thus understood.

Appellant cites Ziff. 12 of the rules and regulations of the minister of the post office in regard to central radio receivers. (Postamtsblatt 1928, S.

306) which reserves rights of third persons. It contends that this refers to the rights of German sending companies in regard to the utilization of their programs. But a central radio receiver which involves a "plant to supply more than ten households" and for which a special license must be obtained is not here involved. Such receivers raise the question of the consent of authors for the radio publication of their works. A new independent activity is involved (compare Neugebauer a.a.O., S. 725).

The contention of appellant that the terms of section 8 of the proclamation of the minister of the post office in regard to broadcasting (Amsbl. des Reichspostministers von 1925 No. 81, S. 443ff), which is concerned with the authorization of the construction and operation of a receiving set means that any utilization of any program received is thereby forbidden is erroneous. It is answered by what has been said above to the effect that such authorization creates juristic relations merely between the subscriber and the post office and not between the subscriber and the sending companies. The words of such section 8 show clearly that the intention is merely to give authority to construct and operate *one* receiving station not a number of them operating contemporaneously.

The intermediate court has considered whether a copyright exists for the news item broadcast by the appellant and received by the appellee. This possibility, as was properly held by the intermediate court, must be eliminated when the *res* of a radio broadcast is considered. Since news items published by newspapers may be republished (compare section 18 Abs. 3 LitUG. vom 19. Juni und Art. 9 Abs. 3 of the Revised treaty of Bern) there is no reason why the same rule should not apply for news items broadcast (Smogschewer, *Rundfunk und Gewerblicher Rechtsschutz* GRUR 1928, S. 317ff, 320). Only simple transmissions of facts are involved.

Appellant apparently does not attack this reasoning. The intermediate court further examines the question whether the facts as stated by the complaint and assumed to be true constitute unfair competition. It answers the question in the negative. It views the plaintiff as an association of sending companies for the purpose of furthering their industrial interests which according to section 13 UnlWG, doubtlessly is authorized to make claims growing out of sections 1 and 22 UnlWG, (compare section 2 of its constitution). It assumes that defendant by publishing an extra has acted "in a business way for the purpose of competition." It further assumes that the contents of the news item, because it was adapted to rejoice the entire German people does not relieve him from a violation of the law in regard to unfair competition if that law is otherwise applicable.

The intermediate court refuses to apply section 1 UnlWG., because it is not shown that the republication of the news item from the broadcast—as is here contended—by defendant in his newspaper is against public policy. The court admits that such an offense generally exists when one appropriates the result of the arduous and expensive labor of others without substantial expense of time, work and money and for the purpose of competition. It is inclined to agree with a case decided by a trial court of Berlin and affirmed by the intermediate court (JW. 1929, 1251 and Arch. f. Funkr. 1, 666) according to which it was a violation against section 1 UnlWG. for a subscriber to appropriate and utilize for business purposes the description

of the last round of a prize fight between two well known boxers by a sport reporter who was present at the ringside and who broadcast his description from the ringside. In the present case however the intermediate court declines in contradistinction to the prize fight case to see anything against public policy because here the whole transaction is not reproduced but only a news item is involved even though it be a very fast one. But this quality is possessed inherently by all radio news items as compared with news appearing in a paper which must be printed before it can be circulated. It declines to see in the utilization of the news through immediate publication in an extra distributed without cost anything which is against public policy. It takes into account the well known fact that according to section 18 Abs. 3 LitUG. of June 19, 1901 news items may without more be reprinted from newspapers which fact so influences public opinion that every passing on of news items occurring in the industrial life must be viewed as harmless. The intermediate court further takes into account that according to section 1 of the conditions imposed by the postoffice on sending stations, which conditions are known to every subscriber, the prohibition against industrial utilization refers only to the broadcast of "other matters" in contradistinction to the broadcast of amusement material and the "news to all." It concludes that these provisions according to the general opinion mean that the industrial utilization of amusement material and news for all is neither forbidden nor offensive.

In consequence the intermediate court refused to see any violation of section 2 UnlWG. and section 826 BGB and dismissed the complaint after showing that when the question was discussed at the press convention of Geneva on August 1927 (Bl. f. Funkr., Heft 10 of October 1927, 179ff.) the experts there assembled were unable to reach an agreement in regard to the question of public policy but were rigidly divided. The result was that merely the principle was agreed to "that the publication of any news item is dependent on only one condition, namely that the item should have been received by its publisher rightfully and not through unfair competition." The intermediate court again stresses the fact that defendant as an authorized subscriber has received the news rightfully.

Appellant contends that this reasoning is wrong. It urges that the above related case JW. 1929, 1251 is to be followed. In that case a phonograph record of a broadcast address made without the license of the sending company was in question. It says that the appropriation of a result obtained by great trouble and expense by others for the purpose of the use of the appropriator in his competition with others is here present through the printing of the extra. The cost of the effort was not only high in general but was greater than usual here because a special reporter was sent to Friedrichshafen and was connected with the Stuttgart station by a special wire. It further contends that defendant by designating his news item as a telegram made it appear to the public as if it had through special organization and special expense of money succeeded in getting this news in a particularly expeditious manner. As against the holding that public policy is not violated plaintiff claims that the provisions of the license, on which the intermediate court relies, have not penetrated into the sphere of general knowledge particularly because it is partly of a technical nature. It

claims that the general opinion of the subscribers is that they are not entitled to utilize the broadcast in any manner. It further contends that the disquisitions of the intermediate court in regard to the deliberations of the press convention of Geneva in August 1927 are erroneous so far as part B of the resolutions are concerned which declares that it is under all circumstances desirable that news items published by radio be protected in such a manner that the publication of such news items during a certain time is legitimate only on condition of mentioning the source and paying a fee.

This much of this contention is true that the resolution formulated by the Press convention of Geneva is not limited to the principle stated by the intermediate court. Apparently only a general principle was involved which the convention was desirous to stress and which was to precede the proposed regulation for cases A and B (unpublished news, published news) though clarity of purpose was sacrificed.

The sentence stressed by the intermediate court is found in the resolution concerning the regulation of the relevant case B (published news). Whether the general principle announced before the treatment of cases A and B that the "principle that the publication of any news item is dependent on this one condition that the news is received by its publisher in a legitimate manner and not through unfair practices" should refer also to case B is despite the general word "publication" which is not confined to the first publication at least doubtful. This point however need not be discussed since the purpose of convening the conference was to bring about the regulation of the protection of the news service on the basis of an international treaty. The negotiations therefore do not present any basis for an already existing protection of the news service according to German law.

It remains to examine whether the presumptions of section 1 UnlWG. exist in connection with section 826 BGB. For section 3 UnlWG., which appellant apparently contends is applicable because defendant by labelling the news as a telegram has made it appear that he obtained this news especially expeditiously through some special organization must be eliminated as there is no finding of fact and the plaintiff has not made any assertions in this regard.

We cannot agree with the appellant that the principles of the above mentioned decision (JW. 1929, 1251) are applicable without more. There can be no doubt but that the utilization of a broadcast by reproducing it on phonograph records and thus taking permanent possession of it and utilizing it commercially, as was done in that case, is contrary to section 1 UnlWG. and section 826 BGB. Such conduct is inconsistent with the views of decency in commercial affairs. An unscrupulous utilization of another's production, the result of great effort and cost, through mere mechanical means in a manner which has the same effect without any improvement and without any addition of any kind is involved. No attempt is present to perfect anything which might protect the attempt from being designated unfair competition. For all progress in culture, particularly in technical matters, is based on the existing achievements is in fact a further development of them. Furthermore an entire production the result of independent work on the part of the sending company is involved which is entitled to protection against unfair practices just as is the case in regard to any

accomplishment or goods so far as it is not entitled to more complete protection. Such more complete protection is imaginable on the basis of an absolute right of the sending companies against the whole world, a violation of which by a third person would be forbidden even though his action is not wrongful. Such a legal principle as applied to radio waves however is connected with very great difficulties.

The situation is different in the present case, where, assuming the statements by the plaintiff to be true, there is only a single utilization of a broadcasted news item. Such a case is distinguishable from that just discussed. This is true even of a republication of news items from another newspaper. Such republication is not a violation of any copyright (compare section 18 Abs. 3 LitUG. of June 19, 1901 and Art. 9 Abs. 3 of the revised treaty of Geneva). Such items are not entitled to copyright. It follows that the same is true of broadcasts of the same nature and analogy which the intermediate court rightly adduces. The possibility of an application of the statute against unfair competition of course remains in both cases. Goldbaum (*Urheberrecht* 2d edition S 233 under G1) points out that continual republication of telegrams and mixed news items from newspapers is a wrongful utilization of the work and efforts of others. The same may be true of the republication of such news as is circulated by radio. In such case section 1 UnlWG must be considered.

Appellee contends that this conclusion is out of the question because both prerequisites of section 1 UnlWG—a competition with the sending companies and an act against public policy—are absent. It contends that newspapers and sending companies do not compete with each other at all, at least not so far as news service in the amusement broadcast and in the newspapers themselves is concerned, since the items published in the newspapers are always subsequent in time to those circulated through the radio.

It is not necessary that competition in order to be such must be exclusive competition. It is sufficient that competitive purposes are pursued provided they are not entirely subsidiary. (*Urteil des erk. Sen. M. u. W.* 25, S. 117). The mere fact that news is published more expeditiously through the radio than through the newspapers does not exclude the possibility of competition between the two. Otherwise there could be no competition between newspapers which are published at different times of the same day. For in this case news items published by the earlier of the papers would have lost the tang of newness and there would be no readers for the later papers which present news which frequently is already known in part to its readers. Experience excludes this conclusion. The present case does not exclude the possibility that the defendant has not definitely given up competition with the radio so far as expeditiousness of news service is concerned. The supposition is not excluded that defendant in connection with an event which occupies such a central position as was the happy landing of the airship *Graf Zeppelin* after its return from America desired to show to the public at Oebisfelde that it was possible for it through its wonderful news service to compete with the radio in regard to expeditiousness of service.

It is possible that the extra, appearing as it did only a little later than the broadcast, had a tendency in regard to a material part of the public to shake its belief in the absolute supremacy of broadcasting so far as expe-

ditionousness is concerned and to raise doubts whether or not to become a subscriber.

It is more likely that defendant's action was intended as competition to the other local newspaper, the *Generalanzeiger*. Since the plaintiff is an association to promote the common interests of the associates it is immaterial under section 13 Abs. 1 *UnlWG.* whether the associates, the German sending companies, are in competition with defendant. For under section 13 Abs. 1 a.a.O. a cause of action is created which rests on the theory that the interest of the general public would be affected if none but the person immediately affected were authorized to bring the action. The purpose is not only to protect the competitor, but, just like the entire law against unfair competition, to oppose any excrecence of competition in any form whatsoever. (Judgment of *erk. Sen.* in *RGZ.* 120, 49; Rosenthal, *Komm.* Note 2 and 9a to section 13). Consequently the plaintiff association is capable to sue for any omissions which are against public policy and which are perpetrated by defendant in connection with its own competitors in *Oebisfelde*. But this is not the theory of the complaint though it, under *Ziff. 2, S. 4* speaks of the "lead which defendant through its utilization of the broadcast obtained as against its local competitor." The plaintiff sees in the action of the defendant an attempt to compete with the sending companies. Its entire argument revolves around this theory.

The intermediate court has found no facts in regard to this matter. This was unnecessary because it dismissed the complaint on the ground that defendant's action was not against public policy.

This theory is correct. There was no misconception as to what is against public policy (section 1 *UnlWG.*, section 826 *BGB.*). The distinguishing feature of the above mentioned case arising in Berlin and in which the action of the then defendant was declared to be against public policy has already been pointed out. There can be no question here of the appropriation of an entire production made available through the radio in perpetuity for repeated performance of the same identical effect, in other words, of the appropriation of an entire result of labor accumulated through the money and efforts of the sending company and valuable as an industrial achievement. Only the utilization of a single news item is involved, though such item was of the intensest interest to the general public. This item had no value beyond the time when it became available and the utilization by defendant consisted merely of taking advantage of the expeditiousness of radio. The item by itself was not an accomplishment of the sending company, it was not the result of its independent labor but because in a few hours, in consequence of its publication in newspapers and extras, the general property of the entire German people. It should be again pointed out that such items according to section 18 Abs. 3 *LitUG.* enjoy no copyright when they are contained in newspapers and there is no reason to apply a different rule to them when they are circulated through the radio. Nor is any such theory indulged in in the interested circles. This circumstance and the contents of section 1 of the license conditions issued to listeners and which are generally known and according to which the prohibition against utilization has no application to radio broadcasts was of importance in deciding the question whether the defendant has acted against public policy and was properly so considered by the intermediate court. In accordance with the present condition of the law the complaint is without foundation and the appeal must be dismissed.